



INTERIOR BOARD OF INDIAN APPEALS

Randall Emm and William Frank v. Phoenix Area Director,
Bureau of Indian Affairs

30 IBIA 72 (10/30/1996)

Related Board cases:

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

RANDALL EMM
and
WILLIAM FRANK

v.

PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-140-A, 95-141-A

Decided October 30, 1996

Appeals from a decision concerning the leasing of Indian agricultural land.

Affirmed as modified.

1. Indians: Leases and Permits: Generally--Indians: Leases
and Permits: Farming and Grazing

The American Indian Agricultural Resources Management Act,
25 U.S.C. §§ 3701-3715 (1994), expands "owner's use" rights as
to trust or restricted lands used for agricultural purposes.

APPEARANCES: Randall Emm, pro se; Cindy Shapiro, Esq., and Carol Yeatman, Esq.,
Carson City, Nevada, for William Frank; Roger Williams, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Randall Emm (Emm), Docket No. IBIA 95-140-A, and William Frank (Frank), Docket No. IBIA 95-141-A, have filed separate appeals from a June 1, 1995, decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the leasing of Allotment 172 on the Walker River Indian Reservation. Frank states that he is also representing Stannard Frank, Jr.; Nellita Frank; Angela Dichoso; and Madeline Frank (collectively referred to as the Frank family). For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Area Director's decision as modified in this decision.

Background

In February 1993, Frank wrote to the Superintendent, Western Nevada Agency, BIA (Superintendent), stating that the owners of Allotments 153, 156, and 172A wished to lease the allotments starting in the 1993 season. There does not appear to be a dispute that all of the interests in Allotments 153 and 156 are owned by the Frank family. Allotment 172 is owned 2/3 by the Frank family and 1/3 by Roger William (Williams). Both the record and the parties indicate that Williams has fenced off and has been

using approximately 6 acres of Allotment 172, which is roughly equivalent to 1/3 of the acreage in the allotment. ^{1/}

In April 1993, Williams informed the Agency that he was interested in being the lessee of the allotments. On April 22, 1993, the Agency Realty Officer wrote to the owners concerning the possible leasing of the three allotments, enclosing a questionnaire asking their desires in the matter. Apparently, William and Randy and Vicki Varian were the only persons who expressed an interest in being the lessees of the allotments. Only one member of the Frank family, Madeline, returned the Agency questionnaire. Madeline indicated that she wished to lease the allotments to the Varians. Williams returned his questionnaire stating that he wanted to lease to himself. A handwritten note in the file states that Vicki Varian called the Agency and stated that they did not wish to lease because of the family problems. The allotments were apparently not leased during the 1993 season.

Frank again requested that the allotments be leased in May 1994. The next document in the record is an October 13, 1994, letter to each of the owners of the allotments, asking for their consent to lease, and showing only Emm as a potential lessee. Williams returned his questionnaire stating that he wished to be the lessee. Nellita, Stannard, and William Frank each circled Emm's name to indicate that they wished to lease to him, and circled "CASH" to indicate they wished to lease for cash rather than for a 50/50 crop share. Madeline and Angela circled "CASH," but did not circle Emm's name.

On November 11, 1994, the Superintendent approved Farm-Pasture Lease No. 675, covering Allotments 153, 156, and 172, with Emm as the lessee. As proof of owner consent, the Superintendent attached the questionnaires discussed above. The Superintendent signed for Williams, stating: "Roger Williams, Und. 1/3 Int., In WR-172 Only. Wish to lease WR-172, but the Majority wish to lease to Randall W. Emm."

Williams appealed to the Area Director from the granting of the lease as it related to Allotment 172. He stated that he had been farming the

^{1/} After beginning consideration of this case, the Board asked the Area Director to provide a complete title record for Allotment 172. The information provided shows that the original allottee was Etta Greeley. The allotment passed to Etta's family upon her death.

In 1956, the entire interest in the allotment was sold to Willie Frank by the members of the Greeley family. Upon Willie's death, the allotment was inherited by his wife, Lillie Williams Frank; and three children, Earl, Stannard, and Lyda. When Stannard died, his interest was inherited by the five members of the Frank family who are the appellants here. Earl and Lyda gift deeded their interests in the allotment to the Frank family.

Upon her death, Lillie devised her interest in the allotment to her sons, Clarence Williams and Johnny Williams. Johnny gift deeded his interest to Alvery Williams. Clarence and Alvery sold their interests to Roger Williams.

fenced portion of that allotment for 15 years, that Stannard Frank 2/ had helped him set the corner posts for his fence, and that he needed the hay produced on that portion of the allotment for his cattle. He suggested several alternative courses of action, including that either he or the Frank family purchase the other's interest in the allotment.

On June 1, 1995, the Area Director reversed the Superintendent's decision and remanded the case, stating that although Williams was not an heir or devisee, his "owner's use" rights in Allotment 172 should have been recognized before the entire allotment was leased to Emm. In reaching his decision, the Area Director reviewed 25 U.S.C. § 380 (1994), 3/ the American Indian Agricultural Resources Management Act (AIARMA), 25 U.S.C. §§ 3701-3715, and 25 CFR 162.2(a)(4). He also referenced Blackhawk v. Billings Area Director, 24 IBIA 275 (1993), and what he termed the "owner's use" policy of the Billings Area Office.

Both Emm and the Frank family appealed this decision to the Board. Emm, the Frank family, and Williams filed briefs.

Discussion and Conclusions

The essence of the Area Director's decision is that Williams had "owner's use" rights in Allotment 172. The Board summarily disposes of the Area Director's reliance on Blackhawk. The "owner's use" policy under discussion in Blackhawk was not established by the Billings Area Office, but rather by the Crow Tribe. Because that "owner's use" policy was a tribal enactment, it does not apply to any other tribe.

The Area Director's conclusion that Williams, had "owner's use" rights under 25 U.S.C. § 380 and 25 CFR 162.2(a)(4), 4/ may also be summarily

2/ For purposes of this decision, the Board assumes that Williams is here referring to Stannard Frank, Sr., who is now deceased.

3/ All further citations to the United States Code are to the 1994 edition.

4/ 25 U.S.C. § 380 states:

"Restricted allotments of deceased Indians may be leased, except for oil and gas purposes, by the superintendents of the reservation within which the lands are located (1) when the heirs or devisees of such decedents have not been determined, and (2) when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of the heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe."

25 CFR 162.2(a), which implements 25 U.S.C. § 380, provides:

"The Secretary may grant leases on individually owned land on behalf of: (1) Persons who are non compos mentis; (2) orphaned minors; (3) the undetermined heirs of a decedent's estate; (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be

addressed. In Fenner v. Acting Billings Area Director, 29 IBIA 116 (1996), the Board held that those provisions did not grant "owner's use" rights to an individual who acquired an interest in trust land through purchase, as Williams did here.

The Area Director additionally relied on 25 U.S.C. § 3715(c), part of the AIARMA. ^{5/} In its review of this section, and of the AIARMA as a whole, the Board has found the statutory language less than clear. Therefore, the Board considers it necessary to engage in a somewhat protracted analysis of that language as it relates to this case.

Subsection 3715(c) (1), which is entitled "Rights of individual or tribal landowners," ^{6/} provides:

Nothing in this section shall be construed as limiting or altering the authority or right of an individual allottee or Indian tribe in the legal or beneficial use of his, her, or its own land or to enter into an agricultural lease of the surface interest of his, her, or its allotment or land under any other provision of law.

The AIARMA does not define the terms "individual landowners" as used in the title of this section or "individual allottee" as used in the text. It defines the term "Indian landowner" to mean "the Indian or Indian tribe that--(A) owns such Indian land, or (B) is the beneficiary of the trust under which such Indian land is held by the United States" (25 U.S.C. § 3703(13)). Section 3703(9) defines "Indian land" to mean "land that is--(A) held in trust by the United States for an Indian tribe; or (B) owned by an Indian or Indian tribe and is subject to restrictions against alienation."

A question arises on the face of the statute because the definition of "Indian land" in section 3703(9) does not include land held in trust by the United States for an individual Indian, although it includes land owned by an individual Indian subject to restrictions against alienation. The Board takes official notice of the fact that a very large amount of land is held

fn. 4 (continued)

entered into; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have given the Secretary written authority to execute leases on their behalf."

^{5/} In the decision under review in Fenner, the Billings Area Director concluded that the AIARMA did not give additional "owner's use" rights. Because of the posture of that case, the Board did not reach that part of the Area Director's decision.

^{6/} In the statute, this provision is entitled "Rights of individual landowners." As it presently appears in the code, the title has evidently been amended by the codifiers to reflect an amendment to the text made in 1994. Act of Nov. 2, 1994, 108 Stat. 4572, § 12(a) (2).

in trust by the United States for individual Indians. Because trust and restricted lands are treated the same for most purposes, and because there is no explanation for the failure to include individually owned trust lands in the definition of Indian land, it is not clear if this omission was intentional or inadvertent. The fact that, in 1994, Congress amended section 3715 (c) (1) to include Indian tribes, which were inadvertently omitted in the original act, suggests the possibility that there might be other inadvertent omissions. See P.L. 103-435, § 12(a), 108 Stat. 4572; H.R. Rep. No. 704, 103rd Cong., 2nd Sess., reprinted in 1994 U.S. Code Cong. & Admin. News (USCCAN) 3625, 3632 ("The amendment clarifies that Indian tribes are not limited in their rights under the section as the original provision only effected [sic] the rights of allottees").

A second question arises from the language of subsection 3715(c)(1), which uses the term "allottee." "Allottee" is a term of art in Indian law, meaning the individual to whom an allotment of land was made. See, e.g., Cohen, Federal Indian Law (1982 ed.) at 39-41. It is a general canon of statutory construction that "where Congress has used technical words or terms of art, 'it (is) proper to explain them by reference to the art or science to which they [are] appropriate.'" Greenleaf v. Goodrich, 101 U.S. 278, 284 (1880)." Corning Glass Works v. Brennan, 417 U.S. 188 (1974). If "allottee" is given, its technical meaning within Indian law in this section, the section would apply only to individuals who actually received an allotment. Although there are some exceptions, for the most part the allotment process ended in 1934 with the enactment of the Indian Reorganization Act, 25 U.S.C. § 461. ^{7/} Thus, only a small percentage of trust or restricted land is still owned by "allottees."

Furthermore, each "allottee" normally owns the full interest in the allotment he or she received.

Although it is not inconceivable that Congress might have intended in the AIARMA to recognize "owner's use" rights only when an allotment was owned by the single, original allottee, such an interpretation would appear to place the AIARMA at odds with 25 U.S.C. § 380 (2), in which Congress had recognized "owner's use" rights as to "heirs and devisees," a situation in which the allotment was necessarily owned by multiple individuals, who were not the original allottee. Because "[w]e assume that Congress is aware of existing law when it passes legislation," Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990), an interpretation of the AIARMA as recognizing "owner's use" rights only if an allotment is owned by the single, original allottee would raise an additional question of whether, and if so how, the AIARMA can be harmonized with existing legislation. Johnson v. First National Bank of Montevideo, 719 F.2d 277 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984).

^{7/} Section 461 provides: "On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."

A further examination of the AIARMA shows, however, that the act uses several terms to refer to those persons owning trust or restricted lands, including "beneficial owners" (§ 3702(2)), "individuals" (§ 3703(12)(E)), "Indian farmers and ranchers" using "their land" (§ 3711(a)(4)), "trust and restricted Indian landowners" (§ 3711(a)(6)), "individual landowners" (title to § 3715(c)), "individual allottees" (text of § 3715(c)(1)), "owners of a majority interest in any trust or restricted land" and "owners of a minority interest in such land" (§ 3715(c)(2)(A)), and "owners of * * * the legal or beneficial title" (§ 3715(c)(2)(B)(3)). Despite the use of these different terms, as noted above, the only ownership term defined in the act is "Indian landowner."

The legislative history, which consists almost exclusively of Senate Report No. 186, 103rd Cong., 1st Sess., reprinted in 1993 USCCAN 2459, offers no real assistance in interpreting the statute. For the most part, the report merely repeats the words of the statute in the same contexts, without additional explanation. In at least two places, the report appears to use the terms "individual owner" and "allottee" as if they were synonymous:

[The Act] contains provisions intended to lead [sic] the most beneficial and economic use of Indian agricultural lands, consistent with the Secretary's trust responsibility and the rights of individual allottees. Section [3715] identifies the responsibilities and authorities of the Secretary, Indian tribal governments, and individual Indian land owners in the leasing of Indian agricultural lands. [Emphasis added.]

(1993 USCCAN at 2468).

[25 U.S.C. § 3715(c)] * * * provides clear authorities for the rights of individual owners of trust or allotted lands in the lease of trust allotted or restricted fee patent lands. Paragraph (1) makes clear that nothing in this Section shall be construed to limit or alter the right of an individual allottee to the use of his or her own land or to enter into an agricultural lease of the surface interest of his or her allotment under any other provision of law. [Emphasis added.]

(Id. at 2470). See also 1993 USCCAN at 2468 where the report refers to the trespass problems encountered by "Indian tribal governments and allottees," although the term "allottee" does not appear in the relevant portion of the statute. But compare, 1993 USCCAN at 2466 (in discussing agricultural and integrated resource management plans, the report mentions the opportunity for input from "tribal members, Indian landowners, Indian allottees").

The starting point for interpreting any statute is the language used by Congress. Norfolk and Western Ry. Co. v. American Train Dispatchers Association, 499 U.S. 117, 128 (1991); Estate of Jacob William Nicholai, 29 IBIA 157, 163 (1996). After a very careful review of the words of the AIARMA and its legislative history, the Board finds that Congress has used

different, undefined, and possibly inconsistent words when speaking of the persons who own an interest in trust or restricted land. Although it has carefully considered the contexts in which the various terms are used, the Board is unable to determine from the statute whether Congress intended these words to have the distinct meanings they would, in all probability, have in other situations.

The Supreme Court has advised that,

[t]he plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). In such cases, the intention of the drafters, rather than the strict language, controls. Ibid.

United States v. Ron Pair Enterprises Inc., 489 U.S. 235, 242 (1989). See also National Labor Relations Board v. Lion Oil Co., 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part: When statutory language allows several different interpretations, the interpretation should be adopted which "can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme, and with the general purposes that Congress manifested"); In re Arizona Appetito's Stores, Inc., 893 F.2d 216, 219 (9th Cir. 1990); United States v. 594,484 Pounds of Salmon, 871 F.2d 824, 827 (9th Cir. 1989).; Reindeer Herders Association v. Juneau Area Director, 23 IBIA 28, 68, 99 I.D. 219, 240 (1992), and cases cited therein.

The legislative history of the AIARMA clearly shows that Congress intended "to enhance the capability of Indian ranchers and farmers to produce crops and products from such [agricultural] lands" and "to streamline and make more efficient the administration of the programs currently administered by the Secretary." 1993 USCCAN at 2459. Congress noted that as of 1992 over 1.1 million acres of trust and restricted land lay idle nationwide. Id. The act itself states that one of its purposes is to "authorize the Secretary to take part in the management of Indian agricultural lands, with the participation of the beneficial owners of the land, in a manner consistent with the trust responsibility of the Secretary and with the objectives of the beneficial owners." (25 U.S.C. § 3702(2)).

More generally, the introductory materials in the Senate report demonstrate an intent to deal with problems currently facing Indian agriculture. The report notes the serious problems faced by all farmers and ranchers in general, and the particular problems unique to Indian agriculture, including the significant problem of highly fractionated ownership. The report evidences an intent to assist Indian farmers, ranchers, and landowners with the presently existing problems in utilizing trust and restricted land. There is, however, no discussion of the ways in which an interest in trust or restricted land was or could be acquired. Other than the use of different

terms to refer to Indian landowners, the Board finds nothing in the legislative history which suggests Congress believed Indian landowners should be treated differently based upon the way in which they acquired their interest in trust or restricted land.

On June 17, 1996, the Department published a proposed rulemaking intended to amend 25 CFR Part 162. 61 FR 30560. Among other things, the proposal incorporated relevant provisions of the AIARMA. The preamble to the publication states at pages 30562-63:

[25 U.S.C. § 3715(c)(1)] originally confirmed the rights of individual "allottees" to use their own property and negotiate their own leases and permits. (By contrast, the 1940 act [25 U.S.C. § 380] allowed the "heirs and devisees" of allottees to prevent us from exercising our broad grant of authority on heirship land, by putting the land to direct use or by entering into a lease or permit during a three-month negotiation period.) [Section 3715 (c) (1)] was subsequently amended to clarify that nothing in the AIARM should be construed as "limiting or altering" the use and negotiation rights of either an "allottee" or a tribe, but the amendment failed to address the question of whether the "heirs and devisees" of allottees (or individual Indian landowners who acquired their interests by deed) may exercise "owner's use" rights under the 1940 act. [Emphasis in original.]

Although the preamble does not further discuss the Department's construction of the statute, the proposed regulations define "heirship land," "individual Indian," "individually owned land," "interest," "majority interest," and "owner" without any distinction as to the way in which an interest in land was acquired. Proposed 162.14(b) would provide in pertinent part: "We [BIA] will not grant a lease or permit pursuant to §§ 162.13(b) or 162.42(b) (which set out circumstances under which BIA may grant a lease), if the land is used by an individual Indian owner and the other owners are receiving a fair annual rental." Nothing in the remainder of proposed Part 162 shows any distinction based upon the way an individual acquired an interest in trust or restricted land. Although these proposed regulations are not in effect, they evidence the way the Department, which was involved, at least to some extent, in the formulation of the AIARMA, believes the statute is properly interpreted.

After considering the language, legislative history, and legislative intent in enacting the AIARMA, and noting the Department's apparent initial interpretation of the act, the Board concludes that it can find nothing to suggest that Congress intended to limit the act's application based upon the way in which individuals acquired their interests in trust or restricted lands. Rather, it appears that Congress was attempting to deal with and ameliorate the problems that generally exist in regard to utilization of all Indian agricultural lands. Those problems are essentially the same whether an interest in trust or restricted land was acquired as an original allotment or through inheritance, devise, gift deed, purchase, or any other way

in which an interest in land may be acquired or transferred. 8/ The Board believes that the best interpretation of the AIARMA is that Congress used different terms to describe Indian landowners interchangeably, with no intent to treat persons differently based upon the way in which the individual acquired the interest in trust or restricted land.

The Board also believes, again based upon the legislative intent in enacting the AIARMA, that the omission of land held by the United States in trust for individual Indians from the definition of "Indian land" in 25 U.S.C. § 3703(9) was inadvertent. Because of the large amount of land held in trust by the United States for individual Indians, the exclusion of those lands from coverage under the AIARMA would significantly hamper, if not essentially defeat, the act's remedial goals. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("In addition we are guided by the familiar canon of statutory construction that remedial legislation should be broadly construed to effectuate its purposes"). 9/

[1] The Board concludes that, notwithstanding the section's use of the term "allottee," Williams falls within the intent of 25 U.S.C. § 3715(c)(1), which states that "[n]othing in this section shall be construed as limiting or altering the authority or right of an individual allottee * * * in the legal or beneficial use of his * * * own land * * *." Therefore, the Board affirms that part of the Area Director's decision in which he held that Williams was entitled to "owner's use" rights in Allotment 172 under the AIARMA. 10/

Citing subsection 3715(c)(2)(A), the Frank family argues that the AIARMA authorizes the majority owners of an allotment to lease the allotment over the objections of the minority owners. The Board finds nothing in the statute to suggest that this right was intended to preempt the right of a minority co-owner to use the land. 11/

8/ This fact is illustrated by this case in which the Frank family and Williams face the same problems as the heirs and devisees of an original allottee. However, each actually received the present interest via a purchaser. In the case of the Frank family, the interest came from the purchaser through inheritance and gift deed; while in Williams' case, the interest came from the purchaser through devise, gift deed, and purchase.

9/ But cf. Hines v. United States Postal Service, 736 F., Supp. 675, 678 (D.S.C. 1990) ("While remedial legislation should be construed broadly to effectuate the purpose of the legislature, this canon of statutory construction does not authorize a court to ignore the plain wording of the statute").

10/ This decision applies only to trust or restricted land used for agricultural purposes, which is the subject of the AIARMA.

11/ Because there is no statutory or regulatory basis for recognizing the informal partition of Allotment 172 which was effected by Williams, whether with or without the assistance of Stannard Frank, Sr., if the co-owners of the allotment continue to be unable to agree on its use, it might be best

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Phoenix Area Director's June 1, 1995, decision is affirmed as modified to cite only the AIARMA as authority for the recognition of "owner's use" rights in this case. This matter is remanded to the Area Director for further action in accordance with this decision. 12/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

fn. 11 (continued)
in the long term for them to consider ways in which ownership could be consolidated. The Area Director has suggested a formal partition, and Williams has suggested a sale among the co-owners.

In the short term, however, the Board noted in Lower Peoples Creek Cooperative v. Acting Billings Area Director, 23 IBIA 297 (1993), that a co-owner claiming "owner's use" of trust or restricted land is required to compensate the other co-owners. Cf. proposed 25 CFR 162.2(b), 61 FR at 30565, and proposed 25 CFR 162.14(b), 61 FR at 30566.

12/ This decision does not address the possible impact of tribal laws relating to Indian agricultural land.